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18
19 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
20 **SAN JOSE DIVISION**

21 ----- X
22 UNITED STATES OF AMERICA, :
: :
23 Plaintiff, : Civil Action No. 22-8989
: :
24 v. : CONSENT DECREE
: :
25 BUCKHORN, INC. :
: :
26 Defendant. :
27 ----- X

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I. BACKGROUND

1
2 A. The United States of America (United States), on behalf of the Administrator of
3 the U.S. Environmental Protection Agency (EPA), filed a complaint in this matter under
4 Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act
5 (CERCLA), as amended, seeking reimbursement of response costs incurred or to be incurred for
6 response actions taken at or in connection with the release or threatened release of hazardous
7 substances at the New Idria Mercury Mine Superfund Site in the town of Idria, San Benito
8 County, California.

9 B. The Defendant Buckhorn (Settling Defendant) has entered into this Consent
10 Decree and does not admit any liability to the Plaintiff United States arising out of the
11 transactions or occurrences alleged in the complaint.

12 C. The purpose of this Consent Decree is to provide for Defendant Buckhorn’s
13 payment of the United States’ Past Response Costs and Future Response Costs. Except as
14 otherwise settled by this Consent Decree with respect to Settling Defendant’s payment of Past
15 Response Costs and Future Response Costs, this Decree does not address Settling Defendant’s
16 obligations or continuing performance under the 2018 Administrative Order on Consent (AOC),
17 CERCLA Docket No. AOC-2014-11.

18 D. The United States and Settling Defendant agree, and this Court by entering this
19 Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith,
20 that settlement of this matter without further litigation and without the admission or adjudication
21 of any issue of fact or law is appropriate and will avoid prolonged and complicated litigation
22 between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

23 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,
24 ADJUDGED, AND DECREED:

II. JURISDICTION

25
26 1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C.
27 §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and has personal jurisdiction over the
28 Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint,

1 the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the
2 Court or to venue in this District. The Settling Defendant shall not challenge entry or the terms of
3 this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.

4 **III. PARTIES BOUND**

5 2. This Consent Decree is binding upon the United States and upon the Settling
6 Defendant and its successors and assigns. Any change in ownership or corporate or other legal
7 status, including but not limited to, any transfer of assets or real or personal property, shall in no
8 way alter the status or responsibilities of the Settling Defendant under this Consent Decree.

9 **IV. DEFINITIONS**

10 3. Unless otherwise expressly provided in this Consent Decree, terms used in this
11 Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA
12 shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms
13 listed below are used in this Consent Decree or its appendices, the following definitions shall
14 apply:

15 “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and
16 Liability Act, as amended, 42 U.S.C. §§ 9601-9675.

17 “Consent Decree” shall mean this Consent Decree and all appendices attached hereto. In
18 the event of conflict between this Consent Decree and any appendix, the Consent Decree shall
19 control. However, no provision of the 2018 AOC attached as Appendix A shall be deemed
20 incorporated into this Consent Decree based solely on its inclusion as an appendix except as
21 expressly stated in this Consent Decree.

22 “Day” or “day” shall mean a calendar day. In computing any period of time under this
23 Consent Decree, where the last day would fall on a Saturday, Sunday, or federal or State holiday,
24 the period shall run until the close of business of the next working day.

25 “DOJ” shall mean the U.S. Department of Justice and its successor departments,
26 agencies, or instrumentalities.

27 “Effective Date” shall mean the date upon which the approval of this Consent Decree is
28 recorded on the Court’s docket.

1 “EPA” shall mean the U.S. Environmental Protection Agency.

2 “EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund
3 established by the Internal Revenue Code, 26 U.S.C. § 9507.

4 “Future Response Costs” means all response costs not inconsistent with the National
5 Contingency Plan (including direct, indirect, payroll, contractor, travel, and laboratory costs) that
6 the United States incurs after June 12, 2021 in (i) enforcing this Decree, but only to the extent
7 that the United States prevails in such enforcement efforts; and (ii) in overseeing Settling
8 Defendant’s performance of any Interim Response Action (“IRA”) that is not performed under
9 the 2018 Administrative Order on Consent and with respect to which EPA has made a
10 determination, pursuant to Section 2.2.14 of the Statement of Work attached thereto, that
11 performance of such IRA, before EPA’s selection of a final remedy, is needed. Notwithstanding
12 the foregoing, Future Response Costs shall not include any costs Buckhorn has paid or is
13 obligated to pay under the 2018 AOC.

14 “Interest” shall mean interest at the rate specified for interest on investments of the EPA
15 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on
16 October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest
17 shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change
18 on October 1 of each year. Rates are available online at
19 <https://www.epa.gov/superfund/superfund-interest-rates>.

20 “Interim Response Action” shall mean any response action prior to the selection of the
21 final remedial action in the Record of Decision for the Site that is not otherwise required or
22 performed under the 2018 AOC.

23 “National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous
24 Substances Pollution Contingency Plan promulgated under Section 105 of CERCLA, 42 U.S.C.
25 § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

26 “New Idria Mercury Mine Special Account” shall mean the special account, within the
27 EPA Hazardous Substance Superfund, established for the Site by EPA under Section 122(b)(3)
28 of CERCLA, 42 U.S.C. § 9622(b)(3).

1 “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral
2 or an upper- or lower-case letter.

3 “Parties” shall mean the United States and Settling Defendant.

4 “Past Response Costs” means all costs (including, without limitation, direct, indirect,
5 payroll, contractor, travel, and laboratory costs) that the United States incurred in connection
6 with the Site through June 12, 2021, plus all accrued interest on such costs accrued under
7 Section 107(a) of CERCLA. Notwithstanding the foregoing, Past Response Costs shall not
8 include any costs Buckhorn has paid or is obligated to pay under the 2018 AOC.

9 “Plaintiff” shall mean the United States.

10 “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901-6992
11 (also known as the Resource Conservation and Recovery Act).

12 “Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

13 “Settling Defendant” or “Defendant” shall mean Buckhorn, Inc.

14 “Site” shall mean the New Idria Mercury Mine Superfund Site, encompassing
15 approximately 2,000 acres, located near the town of Idria, California, roughly 70 miles southeast
16 of Hollister, California, and encompassing the New Idria group of mines and adjacent mining
17 areas in San Benito and Fresno Counties, including but not limited to the New Idria Mercury
18 Mine, the West Idria Mine, the Sulphur Spring Mine, the Molina (aka Molino) Mine, and the San
19 Carlos Mine, from which ore was transported to the New Idria Mercury Mine processing area for
20 treatment, and includes any tunnel, building, structure, installation, equipment, pipe or pipeline
21 well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling
22 stock, or aircraft, or any area in proximity to these mines where mining operations occurred or
23 where a hazardous substance or pollutant or contamination associated with such mining
24 operations or other uses of the property has been deposited, stored, disposed of, or placed, or
25 otherwise come to be located, including surface water bodies or sediments and groundwater, and
26 all suitable areas within proximity of such contamination necessary for the implementation of
27 response actions and depicted generally on the map attached to the 2018 AOC.

28 “State” means the State of California.

1 “United States” shall mean the United States of America and each department, agency,
2 and instrumentality of the United States, including EPA.

3 “2018 Administrative Order on Consent” or “2018 AOC” shall mean EPA’s November
4 27, 2018 Administrative Order on Consent, CERCLA Docket No. AOC-2014-11, including the
5 Statement of Work attached thereto, issued under Sections 104, 107 and 122 of the
6 Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9604,
7 9607 and 9622.

8 **V. PAYMENT OF RESPONSE COSTS**

9 **4. Payment by Settling Defendant for Past Response Costs.** Within 30 days after
10 the Effective Date, Settling Defendant shall pay to EPA One Million Eight Hundred Fifty-Five
11 Thousand Five Hundred Dollars (\$1,855,500.00).

12 5. Settling Defendant shall make payment at <https://www.pay.gov> in accordance
13 with instructions provided to Settling Defendant by the Financial Litigation Unit (FLU) of the
14 U.S. Attorney’s Office for the District of Northern District of California after the Effective Date.
15 The payment instructions provided by the FLU will include a Consolidated Debt Collection
16 System (CDCS) number, Site/Spill ID Number 09K7, and DJ Number 90-11-3-11969, which
17 shall be used to identify all payments required to be made in accordance with this Consent
18 Decree. The FLU will provide the payment instructions to:

19 Lori Copeland
20 Financial Planning and Analysis Manager
21 Buckhorn, Inc.
22 400 Techne Center Dr.
23 Milford, OH 45150
24 Tel: (937) 632-3006
25 Email: lcopeland@buckhorninc.com

26 on behalf of Settling Defendant. Settling Defendant may change the individual to receive
27 payment instructions on its behalf by providing written notice of such change to DOJ and EPA in
28 accordance with Section XIV (Notices and Submissions).

6. **Deposit of Payment.** The total amount to be paid under Paragraph 4 shall be
deposited by EPA in the New Idria Mercury Mine Special Account to be retained and used to

1 conduct or finance response actions at or in connection with the Site, or to be transferred by EPA
2 to the EPA Hazardous Substance Superfund.

3 **7. Notice of Payment.** At the time of payment, Settling Defendant shall send to the
4 United States, in accordance with Section XIV (Notices and Submissions), a notice of this
5 payment including references to the CDCS Number, Site/Spill ID Number 09K7, and DJ
6 Number 90-11-3-11969.

7 **8. Payments by Settling Defendant for Future Response Costs.** Settling
8 Defendant shall pay to EPA all Future Response Costs not inconsistent with the NCP.

9 a. EPA will deposit the amounts paid under this Paragraph into the New Idria
10 Mercury Mine Special Account. EPA will retain and use these funds to conduct or finance
11 response actions at or in connection with the Site.

12 b. **Periodic Bills.** On a periodic basis, EPA will send the Settling Defendant
13 a bill for Future Response Costs, including a cost summary listing direct and indirect costs paid
14 by EPA, its contractors, subcontractors, and DOJ. The Settling Defendant may initiate a dispute
15 under Section VII (Dispute Resolution) regarding a Future Response Cost billing, but only if the
16 dispute relates to one or more of the following issues: (i) whether EPA has made an arithmetical
17 error; (ii) whether EPA has included a cost item that is not within the definition of Future
18 Response Costs; or (iii) whether EPA has paid excess costs as a direct result of an EPA action
19 that was inconsistent with a specific provision or provisions of the NCP. Settling Defendant must
20 specify in the Notice of Dispute the contested costs and the basis for the objection.

21 c. **Payment of Bill.** The Settling Defendant shall pay the bill, or if initiate
22 dispute resolution, the uncontested portion of the bill, if any, within 30 days after receipt of the
23 bill. The Settling Defendant shall pay the contested portion of the bill determined to be owed, if
24 any, within 30 days after the determination regarding the dispute. Each payment for: (i) the
25 uncontested bill or portion of bill, if late, and; (ii) the contested portion of the bill determined to
26 be owed, if any, must include an additional amount for Interest accrued from the date of receipt
27 of the bill through the date of payment. The Settling Defendant shall make payment at
28 <https://www.pay.gov> using the “EPA Miscellaneous Payments Cincinnati Finance Center” link,

1 and include references to the Site/Spill ID and DJ numbers listed in ¶ 41 and the purpose of the
2 payment. The Settling Defendant shall send notices of this payment to DOJ and EPA.

3 d. **Unused Amount.** After EPA conducts a final accounting of the New Idria
4 Mercury Mine Special Account (including 8.c (Payment of Bill)), EPA may, in its unreviewable
5 discretion, apply any unused amount paid by Settling Defendant under this ¶ 8 (Payments by
6 Settling Defendant for Future Response Costs) to any other unreimbursed response costs or
7 response actions remaining at the Site or return it to the Superfund.

8 9. Except as otherwise settled by this Consent Decree with respect to Settling
9 Defendant's payment of Past Response Costs and Future Response Costs, the Parties agree that
10 this Consent Decree does not address Settling Defendant's obligations or continued performance
11 under the 2018 AOC and Settling Defendant otherwise reserves any rights it may have to object
12 to or challenge any EPA action under the 2018 AOC.

13 **VI. FAILURE TO COMPLY WITH CONSENT DECREE**

14 10. **Interest on Late Payments.** If Settling Defendant fails to make any payment
15 under Paragraph 4 (Payment by Settling Defendant for Past Response Costs) or Paragraph 8
16 (Payments by Settling Defendant for Future Response Costs) by the required due date, Interest
17 shall continue to accrue on the unpaid balance through the date of payment.

18 11. **Stipulated Penalty.** If any amounts due to EPA under Paragraph 4 (Payment by
19 Settling Defendant for Past Response Costs) or Paragraph 8 (Payments by Settling Defendant for
20 Future Response Costs) are not paid by the required date, Settling Defendant shall be in violation
21 of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest
22 required by Paragraph 10, \$250 per violation per day that such payment is late for the first such
23 violation, and \$500 per violation per day that such payment is late for any subsequent violations.

24 12. Stipulated penalties are due and payable within 30 days after the date of the
25 demand for payment of the penalties by EPA. Settling Defendant shall make all payments at
26 <https://www.pay.gov> in accordance with the procedures under Paragraph 5 and send notice of
27 this payment in accordance with Paragraph 7 (Notice of Payment). Settling Defendant shall
28

1 indicate in the comment field on the <https://www.pay.gov> payment form that the payment is for
2 stipulated penalties.

3 13. Penalties shall accrue as provided in this Paragraph regardless of whether EPA
4 has notified Settling Defendant of the violation or made a demand for payment, but need only be
5 paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall
6 continue to accrue through the date of payment. Nothing in this Consent Decree shall prevent the
7 simultaneous accrual of separate penalties for separate violations of this Consent Decree.

8 14. If the United States brings an action to enforce this Consent Decree, Settling
9 Defendant shall reimburse the United States for all costs of such action, including but not limited
10 to costs of attorney time, but only to the extent that the United States prevails in such
11 enforcement efforts.

12 15. Payments made under this Section shall be in addition to any other remedies or
13 sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the
14 requirements of this Consent Decree.

15 16. In the event of the insolvency of the Settling Defendant or the failure by the
16 Settling Defendant to make the payments required under this Consent Decree, any successor to
17 Settling Defendant shall be responsible for such payments.

18 17. Notwithstanding any other provision of this Section, the United States may, in its
19 unreviewable discretion, waive payment of any portion of the stipulated penalties that have
20 accrued under this Consent Decree. Payment of stipulated penalties shall not excuse the Settling
21 Defendant from payment as required by Section V (Payment of Response Costs) or from
22 performance of any other requirements of this Consent Decree.

23 **VII. DISPUTE RESOLUTION**

24 18. Unless otherwise provided in this Decree, the Settling Defendant must use the
25 dispute resolution procedures of this Section to resolve any dispute arising under this Decree.
26 The United States may enforce any requirement of the Decree that is not the subject of a pending
27 dispute under this Section.
28

1 19. A dispute will be considered to have arisen when one or more parties sends a
2 written notice of dispute (“Notice of Dispute”). Disputes arising under this Decree must in the
3 first instance be the subject of informal negotiations between the parties to the dispute. The
4 period for informal negotiations may not exceed 20 days after the dispute arises, unless the
5 parties to the dispute otherwise agree. If the parties cannot resolve the dispute by informal
6 negotiations, the position advanced by EPA is binding unless the Settling Defendant initiate
7 formal dispute resolution under ¶ 20. By agreement of the parties, mediation may be used during
8 this informal negotiation period to assist the parties in reaching a voluntary resolution or
9 narrowing of the matters in dispute.

10 20. **Formal Dispute Resolution**

11 a. **Statements of Position.** The Settling Defendant may initiate formal
12 dispute resolution by serving on the Plaintiff, within 20 days after the conclusion of informal
13 dispute resolution under ¶ 19, an initial Statement of Position regarding the matter in dispute.
14 The Plaintiff’s responsive Statement of Position is due within 20 days after receipt of the initial
15 Statement of Position. All Statements of Position must include supporting factual data, analysis,
16 opinion, and other documentation. A reply, if any, is due within 10 days after receipt of the
17 response. If appropriate, EPA may extend the deadlines for filing any statement of position for
18 up to 45 days and may allow the submission of supplemental statements of position.

19 b. **Formal Decision.** The Director of the Superfund & Emergency
20 Management Division, EPA Region 9, will issue a formal decision resolving the dispute
21 (“Formal Decision”) based on the statements of position and any replies and supplemental
22 statements of position. The Formal Decision is binding on the Settling Defendant unless timely
23 seek judicial review under ¶ 21.

24 c. **Compilation of Administrative Record.** EPA shall compile an
25 administrative record regarding the dispute, which must include all statements of position,
26 replies, supplemental statements of position, and the Formal Decision.

27 21. **Judicial Review**

1 a. The Settling Defendant may obtain judicial review of the Formal Decision
2 by filing, within 20 days after receiving it, a motion with the Court and serving the motion on all
3 Parties. The motion must describe the matter in dispute and the relief requested. The parties to
4 the dispute shall brief the matter in accordance with local court rules.

5 b. **Review on the Administrative Record.** Judicial review of disputes
6 regarding the following issues must be on the administrative record: (i) the adequacy or
7 appropriateness of deliverables required under the Decree; (ii) whether a Work Takeover is
8 warranted; (iii) EPA’s selection of modified or further response actions; (vii) any other items
9 requiring EPA approval under the Decree; and (viii) any other disputes that the Court determines
10 should be reviewed on the administrative record. For all of these disputes, the Settling Defendant
11 bear the burden of demonstrating that the Formal Decision was arbitrary and capricious or
12 otherwise not in accordance with law.

13 c. Judicial review of any dispute not governed by ¶ 21.b shall be governed
14 by applicable principles of law.

15 22. **Escrow Account.** For disputes regarding a Future Response Cost billing, the
16 Settling Defendant shall: (a) establish, in a duly chartered bank or trust company, an interest-
17 bearing escrow account that is insured by the Federal Deposit Insurance Corporation (“FDIC”);
18 (b) remit to that escrow account funds equal to the amount of the contested Future Response
19 Costs; and (c) send to EPA copies of the correspondence and of the payment documentation
20 (e.g., the check) that established and funded the escrow account, including the name of the bank,
21 the bank account number, and a bank statement showing the initial balance in the account. EPA
22 may, in its unreviewable discretion, waive the requirement to establish the escrow account. The
23 Settling Defendant shall cause the escrow agent to pay the amounts due to EPA under ¶ 8, if any,
24 by the deadline for such payment in ¶ 8, or within ten (10) business days after the date of a final
25 ruling, if any, in favor of EPA on the dispute, whichever is later. If the dispute is resolved in
26 Settling Defendant’s favor, then the funds placed in escrow may be returned to Settling
27 Defendant and the escrow account may be closed. The Settling Defendant responsible for any
28 balance due under ¶ 8 after the payment by the escrow agent.

X. COVENANTS BY THE SETTLING DEFENDANT

26. **Covenants by the Settling Defendant.** Except as provided in subparagraph (d), the Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs, Future Response Costs, and this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement of Past Response Costs or Future Response Costs from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. § 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which Past Response Costs or Future Response Costs were incurred, including any claim under the United States Constitution, the State of California Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim under Section 107 or 113 of CERCLA, 42 U.S.C. § 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law for Past Response Costs or Future Response Costs.

d. Notwithstanding the foregoing Covenants by Settling Defendant, the Parties agree that Settling Defendant expressly reserves:

(i) Any contribution claims it may have under CERCLA Section 113(f)(3)(B), 42 U.S.C. § 9613(f)(3)(B), against the United States (other than EPA) for Past Response Costs or Future Response Costs paid under this consent decree based on the United States' alleged status as a potentially responsible party pursuant to CERCLA, 42 U.S.C. § 9607(a), at the Site.

(ii) Any claims Settling Defendant may have against the United States under the Tucker Act, 28 U.S.C. § 1491, or for breach of contract, indemnity or reimbursement, under Contract No. TPS-37 136, dated September 19, 1940 or other contract with the United States to purchase mercury, to recover Past Response Costs or Future Response Costs paid under this consent decree.

1 (iii) However, nothing in this Paragraph or this consent decree shall be construed
2 as an agreement or admission by the United States that Settling Defendant has any
3 valid claims against the United States. The United States reserves all its rights
4 and defenses should Settling Defendant pursue any of the reserved claims against
5 the United States. Nor shall this consent decree revive any claims that would be
6 barred by the applicable statute of limitations or extend the statute of limitations
7 applicable to Settling Defendant's potential claims against the United States.

8 27. Nothing in this Consent Decree shall be deemed to constitute approval or
9 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
10 40 C.F.R. § 300.700(d).

11 28. **Waiver of Claims by the Settling Defendant**

12 a. The Settling Defendant agrees not to assert any claims and to waive all
13 claims or causes of action (including but not limited to claims or causes of action under
14 Sections 107(a) and 113 of CERCLA) that they may have:

15 (1) ***De Micromis Waiver***. For all matters relating to the matters addressed in
16 this Consent Decree against any person where the person's liability to the Settling
17 Defendant with respect thereto is based solely on having arranged for disposal or
18 treatment, or for transport for disposal or treatment, of hazardous substances at the
19 Site, or having accepted for transport for disposal or treatment of hazardous
20 substances at the Site, if all or part of the disposal, treatment, or transport
21 occurred before April 1, 2001, and the total amount of material containing
22 hazardous substances contributed by such person to the Site was less than
23 110 gallons of liquid materials or 200 pounds of solid materials;

24 (2) ***De Minimis/Ability to Pay Waiver***. For response costs relating to the Site
25 against any person, except the United States, that has entered or in the future
26 enters into a final CERCLA § 122(g) *de minimis* settlement, or a final settlement
27 based on limited ability to pay, with EPA with respect to the matters addressed in
28 this Consent Decree.

1 b. Exceptions to Waivers

2 (1) The waivers under this Paragraph 28 shall not apply with respect to
3 any defense, claim, or cause of action that the Settling Defendant may have
4 against any person otherwise covered by such waivers if such person asserts a
5 claim or cause of action relating to the matters addressed in this Consent Decree
6 against the Settling Defendant.

7 (2) The waiver under Paragraph 28.a (De Micromis Waiver) shall not
8 apply to any claim or cause of action against any person otherwise covered by
9 such waiver if EPA determines that: (i) the materials containing hazardous
10 substances contributed to the Site by such person contributed significantly or
11 could contribute significantly, either individually or in the aggregate, to the cost
12 of the response action or natural resource restoration at the Site; or (ii) such
13 person has failed to comply with any information request or administrative
14 subpoena issued pursuant to Section 104(e) or 122(e)(3)(B) of CERCLA, 42
15 U.S.C. § 9604(e) or 9622(e)(3)(B), or Section 3007 of RCRA, 42 U.S.C. § 6927,
16 or has impeded or is impeding, through action or inaction, the performance of a
17 response action or natural resource restoration with respect to the Site; or if (iii)
18 such person has been convicted of a criminal violation for the conduct to which
19 the waiver would apply and that conviction has not been vitiated on appeal or
20 otherwise.

21 c. The phrase “matters addressed in this Consent Decree,” as used in this
22 Paragraph 28, shall have the same meaning ascribed to that phrase in Paragraphs 30 and 31.

23 **XI. EFFECT OF SETTLEMENT/CONTRIBUTION**

24 29. Except as provided in Paragraph 28 (Waiver of Claims by the Settling
25 Defendant), nothing in this Consent Decree shall be construed to create any rights in, or grant
26 any cause of action to, any person not a Party to this Consent Decree. Except as provided in
27 Section X (Covenants by the Settling Defendant), each of the Parties expressly reserves any and
28 all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613),

1 defenses, claims, demands, and causes of action that it may have with respect to any matter,
2 transaction, or occurrence relating in any way to the Site against any person not a Party hereto.
3 Nothing in this Consent Decree diminishes the right of the United States, under Section 113(f)(2)
4 and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional
5 response costs or response actions and to enter into settlements that give rise to contribution
6 protection under Section 113(f)(2).

7 30. The Parties agree, and by entering this Consent Decree this Court finds, that this
8 Consent Decree constitutes a judicially-approved settlement that the Settling Defendant has, as
9 of the Effective Date, resolved liability to the United States within the meaning of Section
10 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to
11 protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or
12 as may be otherwise provided by law, for the “matters addressed” in this Consent Decree. The
13 “matters addressed” in this Consent Decree are Past Response Costs and Future Response Costs.

14 31. The Parties further agree, and by entering this Consent Decree this Court finds,
15 that the complaint the United States filed in this action is a civil action within the meaning of
16 Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes
17 a judicially-approved settlement under which the Settling Defendant has, as of the Effective
18 Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of
19 CERCLA, 42 U.S.C. § 9613(f)(3)(B) for “matters addressed” in this Consent Decree.

20 32. The Settling Defendant shall, with respect to any suit or claim brought by it for
21 matters related to this Consent Decree, notify EPA and DOJ in writing no later than 60 days prior
22 to the initiation of such suit or claim. The Settling Defendant also shall, with respect to any suit
23 or claim brought against it for matters related to this Consent Decree, notify EPA and DOJ in
24 writing within 10 days after service of the complaint or claim upon it. In addition, the Settling
25 Defendant shall notify EPA and DOJ within 10 days after service or receipt of any Motion for
26 Summary Judgment, and within 10 days after receipt of any order from a court setting a case for
27 trial, for matters related to this Consent Decree.

28

1 or protected until the United States has had a reasonable opportunity to dispute the privilege or
2 protection claim and any such dispute has been resolved in the Settling Defendant's favor.

3 c. The Settling Defendant may make no claim of privilege or protection
4 regarding:

5 (1) any data regarding the Site, including but not limited to, all sampling,
6 analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or
7 engineering data, or the portion of any other Record that evidences conditions at
8 or around the Site; or

9 (2) the portion of any Record that the Settling Defendant is required to create
10 or generate pursuant to this Consent Decree.

11 36. **Business Confidential Claims.** The Settling Defendant may assert that all or part
12 of a Record submitted to Plaintiff under this Section or Section XIII (Retention of Records) is
13 business confidential to the extent permitted by and in accordance with Section 104(e)(7) of
14 CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). The Settling Defendant shall
15 segregate and clearly identify all Records or parts thereof submitted under this Consent Decree
16 for which the Settling Defendant asserts a business confidentiality claim. Records that the
17 Settling Defendant claims to be confidential business information will be accorded the protection
18 specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records
19 when they are submitted to EPA, or if EPA has notified the Settling Defendant that the Records
20 are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2
21 Subpart B, the public may be given access to such Records without further notice to the Settling
22 Defendant.

23 37. Notwithstanding any provision of this Consent Decree, the United States retains
24 all of its information gathering and inspection authorities and rights, including enforcement
25 actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

26 **XIII. RETENTION OF RECORDS**

27 38. Until 10 years after the Effective Date, the Settling Defendant shall preserve and
28 retain all non-identical copies of Records now in its possession or control or that come into its

1 possession or control, that relate in any manner to its liability under CERCLA with respect to
2 matters addressed in this Consent Decree. Each of the above record retention requirements shall
3 apply regardless of any corporate retention policy to the contrary. The phrase “matters addressed
4 in this Consent Decree,” as used in this Section XIII, shall have the same meaning ascribed to
5 that phrase in Paragraphs 30 and 31.

6 39. At the conclusion of the record retention period, the Settling Defendant shall
7 notify the United States at least 90 days prior to the destruction of any such Records, and, upon
8 request by the United States, and except as provided in Paragraph 35 (Privileged and Protected
9 Claims), the Settling Defendant shall deliver any such Records to EPA.

10 40. The Settling Defendant certifies individually that, to the best of its knowledge and
11 belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise
12 disposed of any Records (other than identical copies) relating to its potential liability regarding
13 the Site since notification of potential liability by the United States or the State and that it has
14 fully complied with any and all EPA and State requests for information regarding the Site
15 pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and
16 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

17 **XIV. NOTICES AND SUBMISSIONS**

18 41. Whenever, under the terms of this Consent Decree, notice is required to be given
19 or a document is required to be sent by one party to another, it shall be directed to the individuals
20 at the addresses specified below, unless those individuals or their successors give notice of a
21 change to the other Parties in writing. Except as otherwise provided, notice to a Party by email
22 (if that option is provided below) or by regular mail in accordance with this Section satisfies any
23 notice requirement of the Consent Decree regarding such Party.

24
25 **As to DOJ by email:** eescdcopy.enrd@usdoj.gov
26
27
28

Re: DJ# 90-11-3-11969

As to DOJ by mail:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-3-11969

As to EPA:

Joshua Wirtschafter
Assistant Regional Counsel, U.S. EPA Region 9

By email:

Wirtschafter.Joshua@epa.gov

By Mail:

Joshua Wirtschafter
Assistant Regional Counsel
U.S. EPA, Region IX
ORC-3
75 Hawthorne Street
San Francisco, CA 94105
Re: Site ID 097K

As to Settling Defendant:

David E. Basque
President
Buckhorn, Inc.
400 Techne Center Drive, Suite 215
Milford, OH 45150
Email: dbasque@buckhorninc.com

With a copy to:

Rich Kupiec
Environmental & Safety Compliance Project Manager
Buckhorn, Inc.
1293 S. Main Street,
Akron, OH 44301
Email: rkupiec@buckhorninc.com

XV. RETENTION OF JURISDICTION

42. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XVI. INTEGRATION/APPENDICES

43. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree: “Appendix A” is a true and correct copy of the AOC, not including its incorporated Statement of Work.

XVII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

44. This Consent Decree shall be lodged with the Court for a period of at least 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling Defendant consents to the entry of this Consent Decree without further notice.

45. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVIII. SIGNATORIES/SERVICE

46. Each undersigned representative of the Settling Defendant and the Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, identified on the DOJ signature page below, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

47. The Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

48. The Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that

1 Party with respect to all matters arising under or relating to this Consent Decree. The Settling
2 Defendant hereby agrees to accept service in that manner and to waive the formal service
3 requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local
4 rules of this Court, including but not limited to, service of a summons. The Parties agree that the
5 Settling Defendant need not file an answer to the complaint in this action unless or until the
6 Court expressly declines to enter this Consent Decree.

7 **XIX. HEADINGS**

8 49. Headings to the Sections and Subsections of this Consent Decree are provided for
9 convenience and do not affect the meaning or interpretation of the provisions of this Consent
10 Decree.

11 **XX. FINAL JUDGMENT**

12 50. Upon entry of this Consent Decree by the Court, this Consent Decree shall
13 constitute the final judgment between and among the United States and the Settling Defendant.

14
15 SO ORDERED THIS ___ DAY OF _____, 20__.

16
17 _____
United States District Judge

Signature Page for Consent Decree Regarding New Idria Mercury Mine Superfund Site

FOR THE UNITED STATES OF AMERICA

TODD KIM
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

RICHARD S. GREENE IV
Senior Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

STEPHANIE HINDS
Acting United States Attorney
District of Northern California

MICHELLE LO
Civil Chief
Assistant United States Attorney
District of Northern California

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Signature Page for Consent Decree Regarding New Idria Mercury Mine Superfund Site

**MICHAEL
MONTGOMERY**

Digitally signed by MICHAEL
MONTGOMERY
Date: 2022.12.14 12:44:49
-08'00'

Michael Montgomery
Director
Superfund and Emergency Management Division
U.S. Environmental Protection Agency
75 Hawthorne St.
San Francisco, CA 94105

1 Signature Page for Consent Decree Regarding New Idria Mercury Mine Superfund Site

2

3

FOR David E. Basque
Buckhorn, Inc.

4

11/3/22

5

Dated

Name (print): David E. Basque
Title: Vice President
Address: 400 Techne Center Drive, Suite 215
Milford, OH 45150

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